

**HRMM&L**

**HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, PC**  
ATTORNEYS AT LAW

24638-002

www.HRMML.com

November 8, 2010

\*Edward Rubin  
J. Edmund Mullin  
Steven H. Lupin  
William C. Roeger, Jr.  
Douglas I. Zeiders  
Carl N. Weiner  
Jonathan Samel, LL.M.  
Merle R. Ochrach  
Mark F. Himsworth  
Steven A. Hann  
Steven B. Barrett  
Christen G. Pionzio  
Joseph J. McGrory, Jr.  
Diane K. Foxman  
Robert E. Slota, Jr.  
James C. Walker  
Kermit L. Rader  
Ethan R. O'Shea  
Bernadette A. Kearney  
Paul G. Mullin  
Karen T. Albright  
John J. Iannozzi  
Timothy P. Briggs  
William G. Roark  
Kevin Cornish  
Andrew P. Grau  
Collin T. Keyser  
Matthew L. Erlanger

**OF COUNSEL:**  
Gerald Hamburg  
J. Scott Maxwell

*\*Board Certified  
Civil Trial Advocate*

**LANSDALE**  
ACTS Center—Blue Bell  
375 Morris Road  
Post Office Box 1479  
Lansdale, PA 19446-0773  
Phone 215-661-0400  
Fax 215-661-0315

**PERKASIE  
LIMERICK  
ALLENTOWN  
HARRISBURG**

**VIA E-FILING: regulations.gov  
AND FEDERAL EXPRESS**

United States Environmental Protection Agency  
Water Docket, Mailcode: 28221T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: Comments to Draft Chesapeake Bay Watershed TMDL on behalf  
of the Capital Region Council of Governments TMDL Work  
Group**

Dear Sir/Madam:

Enclosed please find a hard copy of the Comments to Draft Chesapeake Bay Watershed TMDL on behalf of the Capital Region Council of Governments TMDL Work Group, which was submitted via e-filing on November 8, 2010.

Thank you.

Very truly yours,

**HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN**

By: 

**STEVEN A. HANN**

SAH:ram

Enclosure

{00656110;v1}

AR0035391

## COMMENTS TO DRAFT CHESAPEAKE BAY WATERSHED TMDL ON BEHALF OF THE CAPITAL REGION COUNCIL OF GOVERNMENTS TMDL WORK GROUP

Provided below are the comments of the Capital Region Council of Governments TMDL Work Group to the draft Chesapeake Bay Watershed TMDL ("Bay TMDL" or "draft TMDL" if referring specifically to the draft document) issued by the United States Environmental Protection Agency ("EPA") on September 24, 2010.

1. What is the legal basis for EPA's requirement that either or both the Bay TMDL or state submitted Watershed Implementation Plans ("WIPs") demonstrate a "reasonable assurance" that the non-point source loading reductions will be achieved, given that the term "reasonable assurance" is neither defined in the Clean Water Act nor its implementing regulations? According to the draft TMDL, the only basis for the "reasonable assurance" standard is a 1991 EPA Document entitled "Guidance for Water Quality-Based Decisions: The TMDL Process." EPA has yet to precisely define the term "reasonable assurance" (other than a 2000 TMDL rule, which was ultimately withdrawn) or provide guidance on how such standard is to be evaluated.

2. The draft TMDL states that "EPA is establishing the Chesapeake Bay TMDL pursuant to a number of existing authorities, including the CWA and its implementing regulations..." Section 303(d) of the Clean Water Act provides EPA with the authority to develop a TMDL only if it first disapproves a state submitted TMDL. There is no indication in the draft TMDL that any of the Bay jurisdictions with impaired waters within the Chesapeake Bay Watershed has submitted a TMDL to EPA, which has been subsequently disapproved. Therefore, EPA is without statutory authority to develop the Bay TMDL.

3. The draft TMDL cites to Section 117(g) of the Clean Water Act as providing EPA with authority to develop the Bay TMDL and to require states to develop WIPs. Moreover, in the draft TMDL, EPA asserts that the Bay TMDL is considered a "management plan" under Section 117(g) of the Clean Water Act (p.1-13). In fact, there is no relationship between Section 117 and Section 303 of the Clean Water Act, the latter of which provides the only basis under the Clean Water Act for the establishment of TMDLs.

(a) Even if EPA is provided authority to develop management plans under Section 117(g) of the Clean Water Act, a management plan is not a TMDL (p.1-13). Therefore, Section 117(g)(1) of the Clean Water Act does not provide EPA with the authority to develop the Bay TMDL.

(b) Section 117(g) of the Clean Water Act is self-limiting and does not provide EPA with any legal authority to require states to submit WIPs. Historically, EPA does not regularly approve or disapprove implementation plans as part of its review of state submitted TMDLs.

(c) EPA's existing authority regarding the development of TMDLs under the Clean Water Act does not permit it to unilaterally impose the "backstop allocation" approach, which it

is proposing in the draft TMDL. In fact, such an approach is wholly inconsistent with and contrary to EPA's statutory power under the Clean Water Act. EPA's unilateral decision to "punish" municipal wastewater treatment plants with new, more stringent discharge limitations because of its determination that non-point source loading reductions will not be achieved has no basis in either the Clean Water Act or its implementing regulations, which reserve loading allocation and load reduction determinations to the states.

4. The draft TMDL states that EPA may develop a TMDL in "waters at the direction of, and in cooperation with, the jurisdictions in question." (p.1-13). Where has EPA previously developed a TMDL at the direction of a state or other government entity and where in the Clean Water Act or its implementing regulations is such a process authorized?

5. In discussing EPA's settlement of a lawsuit brought in January, 2009 by the Chesapeake Bay Foundation, the draft TMDL cites to the nondiscretionary duties placed upon EPA under Clean Water Act Section 117(g) and implies that such duties include the development of the Bay TMDL. There is no support to suggest that Section 117(g) of the Clean Water Act includes a nondiscretionary duty on the part of EPA to develop the Bay TMDL.

6. None of the ninety-two (92) impaired streams in the Chesapeake Bay Watershed are in Pennsylvania. What legal authority gives EPA the ability to develop a TMDL that places stringent loading reductions on Pennsylvania sources, when Pennsylvania has no impaired waters subject to the Bay TMDL? What is EPA's authority to impose restrictions on point sources in Pennsylvania as part of the Bay TMDL?

7. The draft TMDL asserts that "[e]xcessive nutrients in the Chesapeake Bay and its tidal tributaries promote a number of undesirable water quality conditions such as excessive algal growth, low dissolved oxygen ("DO"), and reduced water clarity." The TMDL fails to provide any information or evidence that flows from Pennsylvania contribute to this condition, specifically flows from municipal wastewater treatment plants.

8. Monitoring data presented in the draft TMDL does not demonstrate any relationship between point source discharges and low DO.

9. In the draft TMDL, chlorophyll-a is referred to as an indicator of algae level. However, chlorophyll-a is not always a reliable measure of algal biomass.

10. EPA is mandating that new water quality standards be developed by the tidal states. Has EPA evaluated the long-term impact on the restoration of the Chesapeake Bay under a scenario whereby the newly proposed water quality standards are adopted and implemented by Delaware, the District of Columbia, Maryland and Virginia?

11. The draft TMDL does not address the expected change in DO levels in the Chesapeake Bay Watershed if the draft TMDL is implemented in its current form.

12. The draft TMDL suggests a relationship between concentrations of chlorophyll a and low DO and harmful algal blooms. What is the specific concentration level of chlorophyll a that EPA believes triggers harmful algal blooms?

13. The draft TMDL does not specify whether data provided in Section 4.1 regarding jurisdiction loading contributions are delivered loads or edge-of-stream loads.

14. In evaluating the loading reductions required to restore the Chesapeake Bay, did EPA fully evaluate the impact of recent changes to the Blue Plains Wastewater Treatment Plant, which will be discharging 3.8 million pounds of nitrogen less per year under its new permit? Is the Blue Plains plant treated differently under the Bay TMDL and/or EPA's "backstop allocation" approach than wastewater treatment plants in Pennsylvania and elsewhere?

15. The draft TMDL notes throughout that the data used in the Phase 5.3 Chesapeake Bay Watershed Model covers a time period ending in 2005. Some recent data released by EPA indicates that there has been a significant decrease in both nitrogen and phosphorus delivered to the Bay. When will EPA re-run the model using more recent data to reflect such reductions?

16. Table 4-8 of the draft TMDL represents municipal wastewater loads from various jurisdictions to the Chesapeake Bay. What delivery ratios were used to construct these tables and where can such delivery ratios be found?

17. It is critical that the most current delivery ratio data from EPA be provided to the Bay jurisdictions so that this information can be incorporated into their WIPs. These delivery ratios must be realistic and workable so that the jurisdictions can address loading reductions for each sector and the potential effect on nutrient trading. Lack of rationale and final delivery ratios before the state WIPs are developed is counterproductive to the TMDL development process, calls into question the validity of the WIPs and has an adverse impact on the ability of wastewater treatment plants to engage in nutrient trading, either as a buyer or seller of credits.

18. The draft TMDL fails to adequately address real, practical mechanisms to reduce the loading from non-point sources, which account for the majority of the loadings to the Chesapeake Bay.

19. The draft TMDL inadequately addresses the impact of legacy sediment to the Chesapeake Bay despite recent publications and studies addressing this source of nutrients and sediment found in the Chesapeake Bay Watershed (see Pennsylvania's draft WIP, p.128). When will EPA consider the impact of legacy sediment in its Chesapeake Bay Watershed Model?

20. The draft TMDL states that "[t]he combined Chesapeake Bay monitoring and modeling frameworks effectively address all the factors necessary for developing a scientifically sound and reliable TMDL that meets the TMDL regulatory requirements" and cites a number of factors addressed through the models, including the assertion that "non-regulated non-point sources of nitrogen, phosphorus and sediment are fully considered and evaluated...in terms of their relative contributions to water quality impairment of the Chesapeake Bay's tidal waters." If EPA decides to proceed with its "backstop allocation" approach, regulating only point sources of

pollutants to the Bay, the TMDL will cease to be “scientifically sound and reliable” based on the aforementioned provisions. Does EPA expect that regulating only the point sources of nutrients will produce a result consistent with the objective of the Bay TMDL?

21. The draft TMDL is not clear as to how recent the land use data is which was input into the Phase 5.3 Chesapeake Bay Watershed Model.

22. If the Phase 5.3 Chesapeake Bay Watershed Model uses data from non-point source loading, but non-point sources are ultimately not regulated under EPA’s “backstop allocation” approach, is not the integrity of the draft TMDL ultimately called into question because the draft TMDL is relying on a Model that is either no longer being used for its intended purpose or input with data that is not used in the draft TMDL?

23. The draft TMDL notes that “EPA regulations require that in establishing the TMDL, the critical conditions...be identified and employed...” (p.6-3). The discussion regarding critical conditions for DO notes that, “the critical period for evaluation of the DO and water clarity WQS are based on identifying high flow period.” As the draft TMDL further states, “high stream flow most strongly correlated with the worst DO conditions in the Bay. This is logical because most of the nutrient loading contributing to low DO comes from non-point sources...” The same assessment is true for water clarity and SAV. If EPA decides not to regulate loading reductions for non-point sources (“backstop allocation” approach), EPA would, by its own aforementioned statement, be ignoring the critical conditions that lead to the worst DO conditions in the Bay, which is contrary to EPA’s own regulations that require “critical conditions to be identified and employed.”

24. Describe the analysis given to “delivery ratios” in EPA’s establishment of the draft TMDL. According to the draft TMDL, “isolation runs” were used to determine the relative effectiveness” numbers presented in Table 6.5. How many isolation runs were used to develop these numbers?

25. What justification does EPA have for the statement that wasteload allocations “for point sources are determined, in part, on the basis of the expected contributions to be made to pollutant reductions by non-point sources?” Neither the Clean Water Act nor its implementing regulations contain language giving EPA such authority. The TMDL is based on the sum of the wasteload allocations plus the load allocations plus an adequate margin of safety. EPA’s position that a sector’s loading reduction requirements are not based on the pollutant contribution of that sector is contrary to the Clean Water Act.

26. The draft TMDL refers to the “commitments and actions described in the Federal Strategy” as being “a unique and powerful tool to achieve the Bay’s water quality goals and provide additional support for reasonable assurance in this TMDL. What legal effect is given the Federal Strategy? How can a “strategy” provide support for the reasonable assurance determination in the draft TMDL?

27. Since EPA places significant weight on the WIPs, these plans should be part of the TMDL itself and subject to public comment and response by EPA. Accordingly, the

commenter is attaching its comments to Pennsylvania's draft WIP as an attachment to this document.

28. Since every jurisdiction developed WIPs, describing how they would achieve the target allocations for nitrogen, phosphorus, and sediment assigned to the jurisdictions as determined by EPA, and since EPA's decisions to use a backstop allocation approach is triggered by its review of the WIPs, these WIPs should be part of the TMDL and subject to public comment during the TMDL comment period.

29. Pennsylvania met its draft TMDL target for nitrogen, yet EPA rejected Pennsylvania's approach for reductions in nitrogen loading. There is no legal basis for applying a "reasonable assurance" analysis to Pennsylvania's WIP.

30. EPA's discretionary decision to foist all non-point source loading reductions to the point sources is without legal support. EPA's statement in its September 27, 2010 Comment Document on Pennsylvania's WIP states that "load from point source reductions [will be] redistributed to forest, septic, and agriculture sources as possible..." There is no justification, legal or otherwise, for shifting the loading reduction from forest and agriculture sources onto the ratepayers of municipal wastewater treatment plants in the Commonwealth.

31. Has EPA conducted an economic analysis of its backstop allocation approach, which requires use of the "limit of technology" for both nitrogen and phosphorus, on the ratepayers of the municipal wastewater treatment plants in Pennsylvania?

32. The draft TMDL states that "EPA is establishing draft backstop allocations that reduce the point source loadings as necessary to compensate for the deficiencies EPA identified in the reasonable assurance components of the jurisdictions draft Phase I WIPs addressing non-point source reductions" (p.8-9).

(a) Does EPA consider the bases for development of the Bay TMDL, including the monitoring, modeling, identification of critical conditions, etc. essentially a non-issue, now that EPA has indiscriminately foisted upon the point sources the loading reductions assigned to the non-point sources. (See draft TMDL, Sections 1-6.)

(b) EPA appears ambivalent and is completely ignoring the fact that municipal wastewater treatment plants have collectively spent or allocated hundreds of millions of dollars toward design and engineering to meet the discharge requirements in their current state issued NPDES permits, which were intended to demonstrate compliance with Chesapeake Bay-related standards. Many of these upgrades may become obsolete and cannot be used in conjunction with the "backstop allocation" approach limit of technology standard for nitrogen and phosphorus. How can EPA justify this potentially significant waste of money in these difficult economic times to meet the most stringent standard possible, simply because the government is unwilling to allocate loading reductions to non-point sources? EPA must provide to the public justification for such an extraordinary waste of money and full disclosure on the process leading to this decision.

33. EPA has presented a moving target in loading reductions, (see Tables 8-8 and 8-9) because it is uncertain which of the WQS will be applicable to this TMDL. EPA should defer issuance of the TMDL until this matter is resolved.

34. Please describe how EPA determined the limits of technology for nitrogen and phosphorus (3 mg/l and 0.1 mg/l, respectively) to be used in conjunction with the backstop allocation approach. What information or data was used in the decision-making process setting these standards? EPA's decision to impose limits of technology is also contrary to the Clean Water Act because EPA cannot show that Pennsylvania water quality standards are inconsistent with the Clean Water Act.

35. Does EPA expect that all new development within the Chesapeake Bay Watershed obtain offsets from existing sources prior to operation? Will these offsets be required from the same source sector as the new development?

36. It is clear that nutrient credit trading will be severely impacted by the delivery ratio issue discussed earlier in these comments. All trades, including those that have taken place, may be suspect if delivery ratios change during the trading process. The Bay TMDL should also address and delineate guidelines for both interstate and intrastate trading.

37. Does EPA support Pennsylvania's trading program as currently established and as set forth in Pennsylvania's draft WIP?

38. EPA's "backstop allocation" approach will dramatically hinder Pennsylvania's Nutrient Trading program, essentially eliminating all point sources as sellers of credits.

39. EPA states that it will consider revisions to Phase 5.3 Chesapeake Bay Watershed Model. If additional model inputs are necessary to address deficiencies in the model, the issuance of the TMDL should be delayed until such deficiencies are resolved.

40. EPA paints the TMDL as a "moving target." EPA apparently does not appreciate the economic realities of local government, which cannot plan for expensive upgrades on an "as needed" basis, but, in many instances, must secure funding from outside sources, such as the bond market, for a project.

41. Has EPA evaluated any unpermitted sources of pollution to the Chesapeake Bay Watershed and their impact on the levels of nutrients found in the Chesapeake Bay Watershed?

42. Did EPA consider the requirements imposed on local governments, including municipal authorities, (e.g., bidding, procurement, design, construction, financing) in structuring its proposed backstop allocation approach?

43. In developing the TMDL, did EPA or anyone else consider the secondary environmental impacts associated with phosphorus removal?

44. There was no meaningful opportunity to review the model input data before the end of the comment period because the model input data was not available. These input data are voluminous and insufficient time was provided for analysis.

45. In general, EPA provided insufficient time to review and comment on the draft TMDL, given the amount of data and the availability of such data, that were used in the development of the draft TMDL.

46. Attached is a letter sent to the Department by the commenter, dated November 1, 2010, addressing the Department's draft WIP and EPA's "backstop allocation" approach.

Respectfully submitted,

By: 

STEVEN A. HANN  
HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN  
375 Morris Road  
Lansdale, PA 19446  
215-661-0400  
Fax 215-661-0315  
shann@hrmml.com

SCOTT T. WYLAND  
HAWKE MCKEON & SNISCAK LLP  
PO Box 1778  
100 North Tenth Street  
Harrisburg, PA 17101  
717-236-1300  
Fax 717-236-4841  
stwyland@hmslegal.com

Dated: 11/8/2010





HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, PC  
ATTORNEYS AT LAW

24638-002

November 1, 2010

www.HRMMML.com

**VIA HAND DELIVERY**

\*Edward Rubin  
J. Edmund Mullin  
Steven H. Lupin  
William C. Roeger, Jr.  
Douglas I. Zeiders  
Carl N. Weiner  
Jonathan Samel, L.L.M.  
Merle R. Ochroch  
Mark F. Himsforth  
Steven A. Hann  
Steven B. Barrett  
Christen G. Pionais  
Joseph J. McGrory, Jr.  
Diane K. Foxman  
Robert E. Slota, Jr.  
James C. Walker  
Kenneth L. Rader  
Ethana R. O'Shea  
Bernadette A. Kearney  
Paul G. Mullin  
Karen T. Albright  
John I. Iannozzi  
Timothy P. Briggs  
William G. Roach  
Kevin Cornish  
Andrew P. Grau  
Collin T. Keyser  
Matthew L. Erlanger

OF COUNSEL:  
Gerald Hamburg  
J. Scott Maxwell

\*Board Certified  
Civil Trial Advocate

LANSDALE  
ACTS Center—Blue Bell  
375 Morris Road  
Post Office Box 1479  
Lansdale, PA 19446-0773  
Phone 215-661-0400  
Fax 215-661-0315

PERKASIE  
LIMERICK  
ALLENTOWN  
HARRISBURG

John T. Hines, Deputy Secretary  
for Water Management  
Pennsylvania Department of  
Environmental Protection  
Rachel Carson State Office Building  
P.O. Box 8555  
Harrisburg, PA 17105

RE: Draft Chesapeake Bay TMDL

Dear Mr. Hines:

We are writing this letter to you on behalf of the Capital Region Council of Governments ("CAPCOG") and its TMDL Work Group regarding the draft Chesapeake Bay TMDL ("Draft TMDL"), which was issued on September 24, 2010. The purpose of this letter is not to comment specifically on the Draft TMDL or on Pennsylvania's draft Watershed Implementation Plan ("WIP"). Comments to both of these documents will be provided at the appropriate time. Nevertheless, the CAPCOG would like to express its extreme displeasure with the Draft TMDL's approach to addressing pollutant reductions to the Chesapeake Bay from Pennsylvania, specifically as these reductions relate to wastewater treatment plants within the Commonwealth. Putting aside any legal issues that may be relevant to this matter, the United States Environmental Protection Agency's ("EPA") September 27, 2010 comments to Pennsylvania's draft WIP indicate that EPA is poised to force the Pennsylvania Department of Environmental Protection ("Department") to impose additional nitrogen and phosphorus limits on significant wastewater treatment plants in the Commonwealth at a crippling cost to ratepayers, despite the fact that these ratepayers having already collectively spent or allocated hundreds of millions of dollars to meet discharge limits mandated by the Department to address nutrient loadings to the Bay. That is, unless the Department acts quickly to prevent such an inequitable situation from occurring.

Over the past year, the Department has repeatedly and publicly assured Pennsylvania wastewater treatment plants that there will be no more stringent limits imposed upon them with respect to the Chesapeake Bay, beyond those limits contained in their current NPDES permits. During recent public meetings, the Department confirmed this position despite EPA's September 27, 2010 comment document to Pennsylvania's draft WIP, which stated that "unless DEP significantly improves and submits a final Phase I WIP addressing the concerns raised [by EPA]," significant municipal plants in the Commonwealth will be forced to meet the "limit of technology" for nitrogen and phosphorus (3 mg/l TN and .1 mg/l TP). (This scenario is part of EPA's "backstop

{00642063;v2}

allocation" approach should Pennsylvania's final WIP be disapproved by EPA.) At this critical juncture in the development of the Chesapeake Bay TMDL, the Department must demonstrate that its assurance that no more stringent limits will be placed on point sources is more than merely "lip-service."

As you are aware, EPA's position throughout the TMDL development process is that it lacks authority under the Clean Water Act to regulate non-point sources, and that it is the Department's obligation under state law to address the non-point source sector's pollutant contribution to the Bay. Unless we are mistaken, EPA is telling the Department that unless the Department can provide EPA with "reasonable assurance" that Pennsylvania's WIP will meet the Commonwealth's loading reduction obligations under the Draft TMDL, sewer ratepayers alone will be forced to bear virtually the entire economic burden to ensure that Pennsylvania's loading reduction requirements under the Bay TMDL are met. The inequity of this result will be profound. For example, the Department's own data indicate that wastewater treatment plants contribute only twelve percent (12%) of the nitrogen loading in Pennsylvania, while agriculture and forest together account for nearly eighty percent (80%) of the nitrogen loading. Yet, under EPA's backstop allocation approach, the wastewater treatment plants will be responsible for nearly all of the associated loading reductions. (It should be noted here that the nutrient contribution from non-point sources is about eight-times the volume of nutrients from point sources.) Therefore, unless the Department is firmly committed to addressing the non-point source sector loading reductions through its regulatory authority under the Clean Streams Law or other relevant statutes, wastewater treatment plants will be responsible for not only their loading reductions, but also those of the non-point source sector. Forcing ratepayers in the Commonwealth to directly subsidize and pay for the cost of loading reductions for the non-point source sector is simply unacceptable. Frankly, the Commonwealth's wastewater treatment plants and their customers should not be pawns in a policy dispute between the federal and state governments over their political reluctance to fairly and equitably allocate nutrient reductions amongst all sources of nutrients to the Bay. Moreover, does anyone within the Department (or EPA for that matter) actually believe that regulating the point sources, but ignoring the non-point sources, will lead to the restoration of the Chesapeake Bay?

As you know, the cost to implement the limitations in the wastewater treatment plants' current permits exceeds \$1 billion. Under EPA's backstop allocation approach, some newly constructed plant features will become instantly obsolete because the new limits to be imposed by EPA will require process and plant redesign. We understand that the Department itself estimates that the additional cost to the treatment plants to meet the limit of technology standards will be \$1 billion. If that is, indeed, the case, particularly in these troubled economic times, EPA and the Department will have to answer to each and every ratepayer in the Commonwealth for their profoundly wasteful decisions.

In summary, it is incumbent upon the Department to reinvent its WIP and assign proper responsibility for the reduction in pollutants to the Bay to the sector that contributes the largest percentage of such pollutants, the non-point source sector. EPA is adamant that it will not regulate non-point sources; therefore, the Department must mandate non-point source reductions with the same vigor with which it issued expensive

John T. Hines, Deputy Secretary  
Page 3  
November 1, 2010

cap loads on sewer ratepayers. Therefore, it appears that the Department has two choices: 1) revise its WIP to establish effective and mandatory non-point source sector loading reductions; or 2) maintain the status quo and completely disregard the thousands of ratepayers in the Commonwealth who will be forced to bear the burden of an inequitable and disparate plan to restore the Chesapeake Bay. We trust that the Department will choose the former option, and submit a final WIP to EPA on November 29, 2010 which will leave EPA with no other option but to abandon its backstop allocation approach in Pennsylvania.

Very truly yours,

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN

HAWKE MCKEON & SNISCAK LLP

By: 

STEVEN A. HANN

By: 

SCOTT P. WYLAND

cc: John Hanger, Secretary  
Pennsylvania Department of Environmental Protection  
Doug Brennan, Director, Bureau of Regulatory Counsel

## **COMMENTS TO DRAFT PENNSYLVANIA WATERSHED IMPLEMENTATION PLAN ON BEHALF OF THE CAPITAL REGION COUNCIL OF GOVERNMENTS TMDL WORK GROUP**

p.3 The draft WIP asserts that Pennsylvania is "making progress" toward its assigned loading reductions. Yet, EPA has deemed the draft WIP to be insufficient. What steps are or should the Department take to ensure that EPA approves the WIP and abandons its efforts to implement its "backstop allocation" approach as set forth in the draft Chesapeake Bay TMDL?

p.4 The Department is advocating the use of advanced technologies to meet the Commonwealth's loading reductions. Has the Department discussed possible funding of these technologies with Pennsylvania's legislature, EPA or other federal sources?

p.5-6 The Department's Compliance Plan regarding non-point source reduction did not meet EPA's "reasonable assurance" evaluation. Setting aside the legal issues regarding EPA's "reasonable assurance" standard, what does the Department need to do to ensure that it provides EPA with "reasonable assurance" that the non-point source sector will meet its loading reduction obligations?

p.9 Does the Department agree with EPA's apparent interpretation that: (1) EPA has sufficient legal authority to develop the Chesapeake Bay TMDL; and (2) Pennsylvania, with no impaired streams feeding into the Chesapeake Bay, must nonetheless comply with the requirements of the Chesapeake Bay TMDL?

p.15 Did EPA provide the Department with sufficient time to develop its Phase I WIP?

p.16 Does the Department intend to mandate more stringent discharge limitations in municipal wastewater treatment plant permits (i.e., limit of technology) even if EPA insists on retaining the "backstop allocation" approach in the final Chesapeake Bay TMDL?

p.50 In EPA's September 27, 2010 comment document to the Department regarding the draft WIP, EPA suggested that Pennsylvania's Trading Program is not totally satisfactory. How does the Department intend on addressing EPA's concerns and how will this impact the Department's trading program and its strategy on accounting for future growth in the Commonwealth? Moreover, it is critical that DEP obtain the most current delivery ratio data from EPA and incorporate such information into its WIP because trading will be affected by the delivery ratios used in the WIP.

p.52 Does the Department agree with EPA that the limit of technology for nitrogen and phosphorus is 3 mg/l and 0.1 mg/l, respectively?

p.59 The Department has sufficient regulatory authority under the Clean Streams Law to ensure that the non-point source sector meets its loading reduction obligations under the Chesapeake Bay TMDL and the Department should conclusively state that it will use this authority to ensure that the non-point source reductions in the Chesapeake Bay TMDL are met.

p.60 Pennsylvania should further explain how its regulations on Erosion and Sedimentation Control, specifically its new Chapter 102 regulations, which become effective on November 19, 2010, will be used to address the loading reduction requirements of the Chesapeake Bay TMDL.

p.61 Will the Department take legal action under 25 Pa. Code § 91.36 to ensure that all regulatory requirements for nutrient management for manure storage and land application is undertaken?

p.64 In its draft WIP, the Department asserts that: "Pennsylvania's strength in the environmental regulation of agriculture is the laws and regulations currently in place." However, to subsequently concede that Pennsylvania cannot ensure compliance with these laws or regulations because of staffing issues is unacceptable, as compliance is a concern raised by EPA in its September 27, 2010 comment letter to the Department regarding the draft WIP ("...there appears to be a high-level of non-compliance with existing state programs for farm conservation and nutrient management plans" (see p.3) and "Pennsylvania mentioned that its biggest challenge was ensuring compliance with existing regulations...EPA needs more detail on how many farms can be reached, by how many staff, within what timeframe and the resulting nutrient and sediment reductions." (see p.4).)

p.72 The Department must engage EPA regarding the implementation of BMPs between versions 4.3 and 5.3 of EPA's Chesapeake Bay Watershed Model.

p.128 The Department's discussion on legacy sediment is a good first step in addressing the source of nutrients which the Department asserts, that "stream corridor erosion from breached millpond reservoirs – is a substantial source of suspended (i.e., fine grained) sediments and nutrients within the Chesapeake Bay Watershed." How do the Department and EPA intend to address this issue in the context of the Chesapeake Bay TMDL?

[THIS SPACE INTENTIONALLY LEFT BLANK]

Attached is a letter sent to the Department on behalf of the commenter, dated November 1, 2010, regarding Pennsylvania's WIP and EPA's "backstop allocation" approach.

Respectfully submitted,

By: 

STEVEN A. HANN  
HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN  
375 Morris Road  
Lansdale, PA 19446  
215-661-0400  
Fax 215-661-0315  
shann@hrmml.com

SCOTT T. WYLAND  
HAWKE MCKEON & SNISCAK LLP  
PO Box 1778  
100 North Tenth Street  
Harrisburg, PA 17101  
717-236-1300  
Fax 717-236-4841  
stwyland@hmslegal.com

Dated: 11/8/2010



HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, PC  
ATTORNEYS AT LAW

24638-002

November 1, 2010

www.HRMML.com

**VIA HAND DELIVERY**

John T. Hines, Deputy Secretary  
for Water Management  
Pennsylvania Department of  
Environmental Protection  
Rachel Carson State Office Building  
P.O. Box 8555  
Harrisburg, PA 17105

RE: Draft Chesapeake Bay TMDL

Dear Mr. Hines:

We are writing this letter to you on behalf of the Capital Region Council of Governments ("CAPCOG") and its TMDL Work Group regarding the draft Chesapeake Bay TMDL ("Draft TMDL"), which was issued on September 24, 2010. The purpose of this letter is not to comment specifically on the Draft TMDL or on Pennsylvania's draft Watershed Implementation Plan ("WIP"). Comments to both of these documents will be provided at the appropriate time. Nevertheless, the CAPCOG would like to express its extreme displeasure with the Draft TMDL's approach to addressing pollutant reductions to the Chesapeake Bay from Pennsylvania, specifically as these reductions relate to wastewater treatment plants within the Commonwealth. Putting aside any legal issues that may be relevant to this matter, the United States Environmental Protection Agency's ("EPA") September 27, 2010 comments to Pennsylvania's draft WIP indicate that EPA is poised to force the Pennsylvania Department of Environmental Protection ("Department") to impose additional nitrogen and phosphorus limits on significant wastewater treatment plants in the Commonwealth at a crippling cost to ratepayers, despite the fact that these ratepayers having already collectively spent or allocated hundreds of millions of dollars to meet discharge limits mandated by the Department to address nutrient loadings to the Bay. That is, unless the Department acts quickly to prevent such an inequitable situation from occurring.

Over the past year, the Department has repeatedly and publicly assured Pennsylvania wastewater treatment plants that there will be no more stringent limits imposed upon them with respect to the Chesapeake Bay, beyond those limits contained in their current NPDES permits. During recent public meetings, the Department confirmed this position despite EPA's September 27, 2010 comment document to Pennsylvania's draft WIP, which stated that "unless DEP significantly improves and submits a final Phase I WIP addressing the concerns raised [by EPA]," significant municipal plants in the Commonwealth will be forced to meet the "limit of technology" for nitrogen and phosphorus (3 mg/l TN and .1 mg/l TP). (This scenario is part of EPA's "backstop

{00642063.v2}

\*Edward Rubin

J. Edmund Mullin

Steven H. Lupin

William C. Roegeer, Jr.

Douglas I. Zeiders

Carl N. Weiner

Jonathan Sarraf, LL.M.

Merle R. Ochrach

Mark F. Hinsworth

Steven A. Hano

Steven B. Barrett

Christen G. Pionzio

Joseph J. McGrory, Jr.

Diane K. Foxman

Robert E. Skota, Jr.

James C. Walker

Kermit L. Rader

Ethan R. O'Shea

Bernadette A. Kearney

Paul G. Mullin

Karen T. Albright

John J. Iannozzi

Timothy P. Briggs

William G. Roark

Kevin Cornish

Andrew P. Grau

Collin T. Keyser

Matthew L. Erdanger

OF COUNSEL:

Gerald Hamburg

J. Scott Maxwell

\*Board Certified  
Civil Trial Advocate

LANSDALE

ACTS Center—Blue Bell

375 Morris Road

Post Office Box 1479

Lansdale, PA 19446-0773

Phone 215-661-0400

Fax 215-661-0315

PERKASIE

LIMERICK

ALLENTOWN

HARRISBURG

allocation" approach should Pennsylvania's final WIP be disapproved by EPA.) At this critical juncture in the development of the Chesapeake Bay TMDL, the Department must demonstrate that its assurance that no more stringent limits will be placed on point sources is more than merely "lip-service."

As you are aware, EPA's position throughout the TMDL development process is that it lacks authority under the Clean Water Act to regulate non-point sources, and that it is the Department's obligation under state law to address the non-point source sector's pollutant contribution to the Bay. Unless we are mistaken, EPA is telling the Department that unless the Department can provide EPA with "reasonable assurance" that Pennsylvania's WIP will meet the Commonwealth's loading reduction obligations under the Draft TMDL, sewer ratepayers alone will be forced to bear virtually the entire economic burden to ensure that Pennsylvania's loading reduction requirements under the Bay TMDL are met. The inequity of this result will be profound. For example, the Department's own data indicate that wastewater treatment plants contribute only twelve percent (12%) of the nitrogen loading in Pennsylvania, while agriculture and forest together account for nearly eighty percent (80%) of the nitrogen loading. Yet, under EPA's backstop allocation approach, the wastewater treatment plants will be responsible for nearly all of the associated loading reductions. (It should be noted here that the nutrient contribution from non-point sources is about eight-times the volume of nutrients from point sources.) Therefore, unless the Department is firmly committed to addressing the non-point source sector loading reductions through its regulatory authority under the Clean Streams Law or other relevant statutes, wastewater treatment plants will be responsible for not only their loading reductions, but also those of the non-point source sector. Forcing ratepayers in the Commonwealth to directly subsidize and pay for the cost of loading reductions for the non-point source sector is simply unacceptable. Frankly, the Commonwealth's wastewater treatment plants and their customers should not be pawns in a policy dispute between the federal and state governments over their political reluctance to fairly and equitably allocate nutrient reductions amongst all sources of nutrients to the Bay. Moreover, does anyone within the Department (or EPA for that matter) actually believe that regulating the point sources, but ignoring the non-point sources, will lead to the restoration of the Chesapeake Bay?

As you know, the cost to implement the limitations in the wastewater treatment plants' current permits exceeds \$1 billion. Under EPA's backstop allocation approach, some newly constructed plant features will become instantly obsolete because the new limits to be imposed by EPA will require process and plant redesign. We understand that the Department itself estimates that the additional cost to the treatment plants to meet the limit of technology standards will be \$1 billion. If that is, indeed, the case, particularly in these troubled economic times, EPA and the Department will have to answer to each and every ratepayer in the Commonwealth for their profoundly wasteful decisions.

In summary, it is incumbent upon the Department to reinvent its WIP and assign proper responsibility for the reduction in pollutants to the Bay to the sector that contributes the largest percentage of such pollutants, the non-point source sector. EPA is adamant that it will not regulate non-point sources; therefore, the Department must mandate non-point source reductions with the same vigor with which it issued expensive

{00642063;v2}



John T. Hines, Deputy Secretary  
Page 3  
November 1, 2010

cap loads on sewer ratepayers. Therefore, it appears that the Department has two choices: 1) revise its WIP to establish effective and mandatory non-point source sector loading reductions; or 2) maintain the status quo and completely disregard the thousands of ratepayers in the Commonwealth who will be forced to bear the burden of an inequitable and disparate plan to restore the Chesapeake Bay. We trust that the Department will choose the former option, and submit a final WIP to EPA on November 29, 2010 which will leave EPA with no other option but to abandon its backstop allocation approach in Pennsylvania.

Very truly yours,

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN

HAWKE MCKEON & SNISCAK LLP

By:   
STEVEN A. HANN

By:   
SCOTT T. WYLAND

cc: John Hanger, Secretary  
Pennsylvania Department of Environmental Protection  
Doug Brennan, Director, Bureau of Regulatory Counsel

{00642063;v2}

AR0035407